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DROWNING IN WETLANDS JURISDICTIONAL DETERMINATION PROCESS: IMPLEMENTATION OF *RAPANOS v. UNITED STATES*

*Kenneth S. Gould**

I. INTRODUCTION AND OVERVIEW

Although their critical value was not recognized until midway through the Twentieth Century,¹ wetlands serve many important hydrologic, ecological, and biogeochemical functions.² From the beginning of European settlement to the present, approximately fifty percent of wetlands in the conterminous United States have been lost.³ In Arkansas, wetland loss over the same period is approximately seventy-two percent,⁴ with an eighty-nine percent reduction in the delta region of Arkansas.⁵ Arkansas's loss of wetlands is greater than any other inland state.⁶ With the loss of wetlands comes a concomitant loss of the many benefits provided by wetlands.

A brief glimpse into the historical, societal, and legal attitudes toward the value of wetlands is all that is necessary to understand why so many wetland acres have been lost. In 1900, the United States Supreme Court noted:

We think that the trial court might well take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.⁷

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1. KIM DIANA CONNOLLY, STEPHEN M. JOHSON, DOUGLAS R. WILLIAMS, *WETLANDS LAW AND POLICY* 2-7 (2005).

2. See *infra* note 18 and accompanying text for a chart summarizing the primary functions, effects, and values of wetlands.

3. See CONNOLLY, *supra* note 1, at 2; *infra* note 8 (citing applicable studies).

4. THOMAS E. DAHL, *WETLANDS LOSSES IN THE UNITED STATES 1780's TO 1980's* 6 (1990), available at http://wetlandsfws.er.usgs.gov/status_trends/national_reports/1990_Status_1780s_1980s.pdf.

5. MULTI-AGENCY WETLAND PLANNING TEAM, *ARKANSAS WETLAND STRATEGY* 19 (1997) available at http://homepage.mac.com/arkansas_mawpt/Public/Strategy.pdf.

6. DAHL, *supra* note 4.

7. *Leovy v. United States*, 177 U.S. 621, 636 (1900).

This early nuisance characterization began to fade as recognition of the importance of wetlands grew steadily during the first half of the twentieth century. In what is a notable example of the power of form over substance, the tide toward wetlands protection turned most dramatically as a result of a 1956 Fish and Wildlife Service publication that replaced the "swamp" and "bog" terminology with the more pleasing and appealing "wetlands."⁸

Today, through court interpretation and administrative agency adoption of related regulations, § 404 of the Clean Water Act of 1972 (the "Act") has become the major tool for protection of wetlands.⁹ Section 404(a) requires a permit from the United States Army Corps of Engineers (the "Corps") for "the discharge of dredged or fill material into the navigable waters at specified disposal sites."¹⁰ Stated generally and reduced to more common parlance by judicial and regulatory construction, the language of § 404(a) prohibits non-permitted dredging and filling of protected waters, including wetlands. If the Corps concludes that development activity might harm wetlands subject to Corps jurisdictional protection, it can decline to issue a permit to allow development or issue a permit under conditions designed to protect the wetlands from harm.¹¹

On June 19, 2006, the United States Supreme Court decided the long awaited and much anticipated case of *Rapanos v. United States*.¹² Although the case had been expected to clarify federal wetland protection authority under § 404(a), specifically the authority to regulate and protect wetlands adjacent to non-navigable tributaries of traditional navigable waters, the decision generated more questions than it answered. The sixty-three page decision¹³ includes five separate opinions, none commanding the agreement of a majority of the Court.¹⁴ Without majority support for any of the five *Rapanos* opinions, the decision did not serve as the hoped-for definitive vehicle for clarification of § 404(a) wetland protection authority. Following *Rapanos* and prior related decisions, one estimate, perhaps somewhat pes-

8. Samuel P. Shaw & C. Gordon Fredine, *Wetlands of the United States: Their Extent and Their Value to Waterfowl and Other Wildlife*, Fish and Wildlife Service Circular 39 (Dep't of Interior 1956) available at <http://www.npwrc.usgs.gov/resource/wetlands/uswetlan/index.htm>.

9. CONNOLLY, *supra* note 1, at 1.

10. 33 U.S.C. § 1344(a) (2000). This section was § 404(a) of the Clean Water Act as originally enacted and is popularly known by that designation. The reference to that section in these materials will be to § 404(a).

11. 33 U.S.C. § 1344(c) (2000).

12. 547 U.S. 715 (2006).

13. As paginated in the Supreme Court Reporter.

14. A plurality opinion of Justice Scalia in which Chief Justice Roberts and Justices Thomas and Alito joined; a concurring opinion of Chief Justice Roberts; an opinion of Justice Kennedy concurring in the judgment; a dissenting opinion of Justice Stevens in which Justices Souter, Ginsburg, and Breyer joined; and a dissenting opinion of Justice Breyer.

simistically, categorized one-half of United States wetlands as vulnerable to development.¹⁵ After briefly reviewing the hydro-geophysical features encompassed by wetlands, their importance, and the history of the Corps' authority to protect wetlands, this article examines *Rapanos* and its precursor decisions, briefly considers the application of Justice Kennedy's controlling concurring opinion "significant nexus" test to Arkansas wetlands, and then focuses on the impact of the decision on the process by which wetlands are determined to be within the jurisdictional requirements of § 404(a) of the Clean Water Act.

II. WETLANDS AND THEIR IMPORTANCE—GENERALLY AND IN ARKANSAS

A. Wetlands Described

Although in large measure the dispute in *Rapanos* is about defining the extent of wetlands for purposes of Clean Water Act jurisdiction, the starting point for analysis of the decision and its impact is with the general connotation of the term. A succinct definition of wetlands is provided by the Corps of Engineers' regulation: "The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."¹⁶ The Corps' definition concludes with a working thumbnail recogni-

15. Press Release, Eric Schaeffer, The Environmental Integrity Project, Half of U.S. Wetlands Now Vulnerable Under Unwise Decision (June 22, 2006) (on file with author and available at <http://www.environmentalintegrity.org/pub372.cfm>).

16. 33 C.F.R. § 328.3(b). The United States Environmental Protection Agency provides a more elaborate and comprehensive description of wetlands:

Wetlands are areas where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods of time during the year, including during the growing season. Water saturation (hydrology) largely determines how the soil develops and the types of plant and animal communities living in and on the soil. Wetlands may support both aquatic and terrestrial species. The prolonged presence of water creates conditions that favor the growth of specially adapted plants (hydrophytes) and promote the development of characteristic wetland (hydric) soils.

Wetlands vary widely because of regional and local differences in soils, topography, climate, hydrology, water chemistry, vegetation, and other factors, including human disturbance. Indeed, wetlands are found from the tundra to the tropics and on every continent except Antarctica. Two general categories of wetlands are recognized: coastal or tidal wetlands and inland or non-tidal wetlands.

Coastal wetlands in the United States, as their name suggests, are found along the Atlantic, Pacific, Alaskan, and Gulf coasts. They are closely linked to our nation's estuaries, where sea water mixes with fresh water to form an environment of varying salinities. The salt water and the fluctuating water levels (due to tidal action) combine to create a rather difficult environment for most plants. Conse-

tion that, "[w]etlands generally include swamps, marshes, bogs, and similar areas."¹⁷

B. The Importance of Wetlands

Review of the important roles played by wetlands is helpful to an understanding of the *Rapanos* decision. The following chart summarizes the primary functions, effects, and values of wetlands.¹⁸

quently, many shallow coastal areas are unvegetated mud flats or sand flats. Some plants, however, have successfully adapted to this environment. Certain grasses and grasslike plants that adapt to the saline conditions form the tidal salt marshes that are found along the Atlantic, Gulf, and Pacific coasts. Mangrove swamps, with salt-loving shrubs or trees, are common in tropical climates, such as in southern Florida and Puerto Rico. Some tidal freshwater wetlands form beyond the upper edges of tidal salt marshes where the influence of salt water ends. Inland wetlands are most common on floodplains along rivers and streams (riparian wetlands), in isolated depressions surrounded by dry land (for example, playas, basins, and "potholes"), along the margins of lakes and ponds, and in other low-lying areas where the groundwater intercepts the soil surface or where precipitation sufficiently saturates the soil (vernal pools and bogs). Inland wetlands include marshes and wet meadows dominated by herbaceous plants, swamps dominated by shrubs, and wooded swamps dominated by trees. Certain types of inland wetlands are common to particular regions of the country: bogs and fens of the northeastern and north-central states and Alaska, wet meadows or wet prairies in the Midwest[,] inland saline and alkaline marshes and riparian wetlands of the arid and semiarid west prairie potholes of Iowa, Minnesota and the Dakotas[,] alpine meadows of the west, playa lakes of the southwest and Great Plains[,] bottomland hardwood swamps of the south pocosins[,] and Carolina Bays of the southeast coastal states, and tundra wetlands of Alaska.

Many of these wetlands are seasonal (they are dry one or more seasons every year), and, particularly in the arid and semiarid West, may be wet only periodically. The quantity of water present and the timing of its presence in part determine the functions of a wetland and its role in the environment. Even wetlands that appear dry at times for significant parts of the year—such as vernal pools—often provide critical habitat for wildlife adapted to breeding exclusively in these areas.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AMERICA'S WETLANDS: OUR VITAL LINK BETWEEN LAND AND WATER 4-4 (1995), available at <http://www.epa.gov/OWOW/wetlands/vital/what.html> (emphasis omitted).

17. 33 C.F.R. § 328.3(b).

18. Chart adapted from United States Army Corps of Engineers, Wetland Functions and Values as adapted from the National Science Foundation, 1995, and William J. Mitch, 1993, available at <http://www.usace.army.mil/cw/cecwo/reg/wet-f-v.htm> (original formatting altered).

FUNCTION	EFFECT	SOCIETAL VALUE
HYDROLOGIC		
<ul style="list-style-type: none"> • Short-term surface water storage • Long-term surface water storage • Maintenance of high water tables 	<ul style="list-style-type: none"> • Reduced downstream flood peaks • Maintenance of stream flows, seasonal stream flow moderation • Maintenance of hydrophytic plants, ground water for tree and crop growth 	<ul style="list-style-type: none"> • Reduced property and crop damage from floodwaters • Maintenance of fish habitat during dry periods • Maintenance of biodiversity, increased timber and crop production
BIOGEOCHEMICAL		
<ul style="list-style-type: none"> • Transformation and cycling of elements • Retention, removal of dissolved substances • Accumulation of peat • Accumulation/retention of inorganic sediment 	<ul style="list-style-type: none"> • Maintenance of nutrient stocks within wetland, production of dissolved and partially decayed organic matter • Reduced transport of nutrients and pesticides downstream • Retention of nutrients, carbon, metals, other substances • Retention of sediment and attached pesticides, phosphate and other nutrients 	<ul style="list-style-type: none"> • Timber production, food for fish and shellfish downstream, support of recreational and commercial fishing • Maintenance of water quality, safer drinking water • Maintenance of water quality, reduction of global warming • Maintenance of water quality, clear water, high quality fish populations in streams
HABITAT & FOOD WEB SUPPORT		
<ul style="list-style-type: none"> • Maintenance of characteristic plant communities • Maintenance of characteristic energy flow 	<ul style="list-style-type: none"> • Food and escape and nesting cover for wildlife; spawning and nursery habitat for fish and shellfish; food for humans • Support for populations of vertebrates and invertebrates 	<ul style="list-style-type: none"> • Support for waterfowl and other wild game, furbearers, uncommon and rare and endangered species, fish, and shellfish. Recreational and commercial hunting, fishing and bird watching • Maintenance of biodiversity, bird watching, aesthetic

Wetlands play vital roles in recreation, tourism, protection of fish and wildlife, and the economy.¹⁹ Property on which wetlands are located is often desirable for development but must be filled before development can occur. Of course, it is the filling of the wetlands that gives rise to the need for 404(a) protection.

C. Arkansas Wetlands

Wetlands in Arkansas are of five types: (1) "Riverine wetlands are [] directly flooded by streamflow, including backwater or overbank flow, at least once in five years on average (i.e., they are within the five-year flood-plain)",²⁰ (2) "Fringe wetlands . . . [are found] along the margins of lakes",²¹ (3) "Depressional wetlands" occur in topographic low points where water in the form of precipitation, runoff, groundwater, or stream flooding accumulates and remains for extended periods;²² (4) "Flats wetlands" are also a consequence of precipitation, occur in areas with little or no gradient and have minimal overland flow into or out of the wetland except as saturated flow;²³ (5) "Slope wetlands" are the result of seepage from groundwater discharge or shallow subsurface flow that creates saturated conditions in areas of sloping land surfaces.²⁴ Classification of wetlands is significant to the construction of Corps regulatory authority under *Rapanos* because there appears to be a direct, though not precise, relationship between § 404 jurisdictional authority and the classification category into which particular wetlands fall.

19. THE RAMSAR CONVENTION ON WETLANDS, BACKGROUND PAPERS ON WETLAND VALUES AND FUNCTIONS (2002) http://www.ramsar.org/info/values_intro_e.htm.

20. ARKANSAS MULTI-AGENCY WETLAND PLANNING TEAM, WETLANDS IN ARKANSAS, CLASSIFICATION & CHARACTERIZATION OF THE WETLANDS OF ARKANSAS RIVERINE (2001), <http://www.mawpt.org/wetlands/classification/classes.asp?className=Riverine>.

21. ARKANSAS MULTI-AGENCY WETLAND PLANNING TEAM, WETLANDS IN ARKANSAS, CLASSIFICATION & CHARACTERIZATION OF THE WETLANDS OF ARKANSAS, FRINGE (2001), <http://www.mawpt.org/wetlands/classification/classes.asp?className=Fringe>.

22. ARKANSAS MULTI-AGENCY WETLAND PLANNING TEAM, WETLANDS IN ARKANSAS, CLASSIFICATION & CHARACTERIZATION OF THE WETLANDS OF ARKANSAS, DEPRESSIONS (2001), <http://www.mawpt.org/wetlands/classification/classes.asp?className=Depressions>.

23. ARKANSAS MULTI-AGENCY WETLAND PLANNING TEAM, WETLANDS IN ARKANSAS, CLASSIFICATION & CHARACTERIZATION OF THE WETLANDS OF ARKANSAS, FLATS (2001), <http://www.mawpt.org/wetlands/classification/classes.asp?className=Flats>.

24. ARKANSAS MULTI-AGENCY WETLAND PLANNING TEAM, WETLANDS IN ARKANSAS, CLASSIFICATION & CHARACTERIZATION OF THE WETLANDS OF ARKANSAS, SLOPES (2001), <http://www.mawpt.org/wetlands/classification/classes.asp?className=Slopes>.

III. CORPS OF ENGINEERS STATUTORY AND REGULATORY AUTHORITY OVER WETLANDS UNDER § 404(A) OF THE CLEAN WATER ACT

The key to gauging the scope of Clean Water Act jurisdiction is in the meaning of “navigable waters” as used not only in the § 404(a)²⁵ “discharge of dredged or fill material into the navigable waters” terminology but also in a number of other pollution control provisions of the Act, including the § 402 permit program for point source discharges,²⁶ the regulation of discharges of oil and hazardous substances,²⁷ and the regulation of discharges of vessel sewage.²⁸ “Navigable waters” had been well defined in various federal regulatory contexts for over a century before its 1972 inclusion in § 404(a). The 1870 United States Supreme Court decision of *The Daniel Ball*²⁹ defined navigable waters as those that are “navigable in fact,” that is, waters that “are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”³⁰

Since few wetlands are navigable in fact as highways for commerce, regulatory authority limited to the traditional navigable waters definition would offer relatively meager wetland protection. However, the Clean Water Act specifically defines “navigable waters” as “the waters of the United States.”³¹ The amorphous “waters of the United States” is ostensibly a broader concept than the traditionally and more concretely defined “navigable waters” and yields a definitional puzzle rather than clarity. The Act offers no further guidance as to the scope of the “navigable waters” and “waters of the United States” terminology. It is the conundrum presented by the definition of “navigable waters” that gives rise to the controversy surrounding the extent of the Corps’ regulatory authority to protect wetlands. The essential questions are whether “waters of the United States” is simply a synonym for navigable waters as traditionally defined or whether the term encompasses a broader construct, and, if broader, what is the extent of the Corps’ § 404(a) jurisdictional authority.

25. Section 404(a) requires a permit for “the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a) (2000).

26. 33 U.S.C. § 1311 prohibits “discharge of any pollutant” in general. The definitional section of the Clean Water Act, § 1362, defines the terms “discharge of a pollutant” and “discharge of pollutants” as meaning “any addition of any pollutant to navigable waters from any point source . . .” 33 U.S.C. § 1362 (2000).

27. 33 U.S.C. § 1321 (2000).

28. 33 U.S.C. § 1322 (2000).

29. 77 U.S. 557 (1870).

30. *Id.* at 563.

31. 33 U.S.C. § 1362(7) (2000). “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” *Id.*

The Corps of Engineers and the Environmental Protection Agency have adopted regulations reading § 404(a) jurisdiction expansively,³² interpreting the "waters of the United States" definition of "navigable waters" as granting authority to regulate beyond traditional navigable waters:

The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader understand the difference between the two. "Navigable waters of the United States" are defined in 33 CFR part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899. "*Waters of the United States*" are defined in 33 CFR part 328. These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to section 404 of the Clean Water Act.³³

More specifically, the Corps' regulations define "the waters of the United States" to include:³⁴

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide [traditional interstate navigable waters];
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie pot-holes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

32. The Corps' regulations initially construed the statutory language to cover navigable in fact waters only. See 39 Fed. Reg. 12,119 (Apr. 3, 1974) (codified at 33 C.F.R. § 209.120(d)(1)). In 1975 the United States District Court for the District of Columbia enjoined the regulations as too narrowly drawn, and the Corps did not appeal the decision. See *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.C. 1975). The Corps then adopted new regulations that sought to extend the reach of the "waters of the United States" definition to the bounds of Congress's power under the Commerce Clause. See 40 Fed. Reg. 31,324-25 (July 25, 1975); 42 Fed. Reg. 37,144, n.2 (July 25, 1977).

33. 33 C.F.R. § 320.1(d) (emphasis added).

34. 33 C.F.R. § 328.3(a).

- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in (a)(1) through (4), of this section;
- (6) The territorial seas; and
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section³⁵

To flesh out the meaning of adjacency, the Corps' regulations define "adjacent" as "bordering, contiguous, or neighboring" and include wetlands "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like" ³⁶

The ultimate limitation on § 404(a) jurisdiction is Congress's authority under the Interstate Commerce Clause.³⁷ Though the Supreme Court's interpretation of the extent of Congress's jurisdiction granting authority under that Commerce Clause has waxed and waned over the years, until recently the trend was for the Court to read the Commerce Clause expansively.³⁸ In several cases beginning in 1995, however, the Court has retreated somewhat from the high water mark of Commerce Clause jurisprudence. In the 1995 case, *United States v. Lopez*,³⁹ the Court held that the federal Gun-Free School Zones Act of 1990 forbidding "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone" exceeded Congress's Commerce Clause authority. To come within that authority, the activity must fall within at least one of three categories:

First, Congress may regulate the use of the channels of interstate commerce Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce⁴⁰

35. *Id.*

36. 33 C.F.R. § 328.3(c).

37. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" U.S. CONST. art I, § 8.

38. "After broadly construing the scope of congressional authority under the Commerce Clause for nearly sixty years, in 1995, the Supreme Court stunned many legal commentators by striking down a federal statute regulating intrastate gun possession near local schools in *United States v. Lopez*, a five-to-four decision. . . ." Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 723 (2002).

39. 514 U.S. 549, 551 (1995).

40. *Id.* at 55-59.

In 2000, *United States v. Morrison*⁴¹ struck down the federal Violence Against Women Act. The Court found that even though Congress had assembled data demonstrating that intrastate violence against women did have an impact on interstate commerce, “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”⁴² In addition, the Court stated, “[w]e . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁴³ The Court’s focus was on the regulated activity having some economic character, concluding that “*Lopez*’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”⁴⁴ Although precise translation of the recent Commerce Clause cases to the context of the extent of § 404 jurisdictional authority is difficult, the contraction of Commerce Clause reach is reflected in both the plurality’s and Justice Kennedy’s opinions in *Rapanos* and in the majority’s opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,⁴⁵ the Supreme Court § 404(a) jurisdictional decision preceding *Rapanos*.⁴⁶

41. 529 U.S. 598 (2000).

42. *Id.* at 618.

43. *Id.* at 617.

44. *Id.* at 611.

45. 531 U.S. 159 (2001) (“*SWANCC*”).

46. From Justice Scalia’s opinion for the plurality in *Rapanos*:

Likewise, just as we noted in *SWANCC*, the Corps’ interpretation stretches the outer limits of Congress’s commerce power and raises difficult questions about the ultimate scope of that power. *See* 531 U.S. at 173. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. *See* 42 Fed. Reg. 37127 (1977)). Even if the term “the waters of the United States” were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.

Rapanos v. United States, 547 U.S. 715, 715 (2006).

Justice Kennedy stated in his concurring opinion in *Rapanos* that “in *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. . . .” *Id.* at 776. Justice Kennedy continued stating as follows:

This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to

IV. THE PATH TO *RAPANOS*A. *United States v. Riverside Bayview Homes, Inc.*

If the jurisdictional reach of the Clean Water Act had simply been by reference to the traditional definition of "navigable waters," as adopted in *The Daniel Ball* and recited in numerous other Supreme Court decisions,⁴⁷ the proposition that § 404(a) requires a Corps permit to fill wetlands could not be sustained in most cases. The Act's definition of "navigable waters" as "the waters of the United States," however, raises the questions of whether the waters covered by the Clean Water Act are more extensive than those to which the traditional definition applies and whether the regulations adopting a broader interpretation are valid. That the primary concern of the Clean Water Act is with water pollution rather than navigation⁴⁸ gives some cre-

tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty. . . .

Id. at 782. Justice Kennedy stated further that "[t]he possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure." *Id.* at 783.

From the majority opinion in *SWANCC*:

These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use . . . We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.

SWANCC, 531 U.S. at 174.

47. See, e.g., *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940); *United States v. Oregon*, 295 U.S. 1, 15 (1935); *United States v. Utah*, 283 U.S. 64, 76 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922); *United States v. Cress*, 243 U.S. 316, 323 (1917); *Leovy v. United States*, 177 U.S. 621, 630-31 (1900); *United States v. Rio Grande, Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899); *Packer v. Bird*, 137 U.S. 661, 667 (1891); *The Montello*, 87 U.S. 430, 439 (1874).

48. As expressed in the Clean Water Act, the goal and policy of Congress is as follows:

[T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

dence to a broader construction of the "waters of the United States" phrase, a notion recognized by the Supreme Court in the 1985 decision of *United States v. Riverside Bayview Homes, Inc.*,⁴⁹ the first step on the Supreme Court's road to *Rapanos*.

In *Riverside Bayview Homes* the Court considered whether the Corps' jurisdiction under § 404(a) extended to a wetland adjacent to a traditional navigable stream flowing into Lake St. Clair in Michigan.⁵⁰ The wetland was saturated by groundwater, not surface water, but "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of [Riverside Bayview's] property to Black Creek, a navigable waterway."⁵¹

The Court in *Riverside Bayview Homes* noted that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'"⁵² The Court, however, recognized that:

Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aqua-

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. 1251 (2000).

49. 474 U.S. 121, 121 (1985).

50. *Id.* at 131.

51. *Id.*

52. *Id.* at 132.

tic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.⁵³

The Court found that inundation or frequent flooding by the adjacent waterway was not necessary to the Corps' regulatory authority,⁵⁴ and that the wetland fit within the regulation, giving the regulation "*Chevron* deference."⁵⁵ As stated in *Riverside Bayview Homes*, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁵⁶ an agency's construction and application "of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."⁵⁷

Of perhaps greatest interest to the significance to be accorded the "navigable waters" terminology in the Clean Water Act, the Court in *Riverside Bayview Homes* discounted the weight to be attributed to the term, saying:

[T]he Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.⁵⁸

B. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*

The question of the significance to be given "navigable waters" in § 404(a) also arose sixteen years later in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.⁵⁹ In *SWANCC* the Court considered the Corps' authority to regulate wetlands with no hydrologic connection to traditional navigable waters, an issue specifically left open in *Riverside Bayview Homes*.⁶⁰ The waters in *SWANCC* were seasonal pond depressions at an abandoned gravel quarry that *SWANCC* wanted to use as a waste disposal site. The Corps' claim to jurisdiction over the isolated ponds was not based on a hydrologic connection to traditional navigable waters but on its "Migratory Bird Rule." That "rule" was incorporated into the 1986 Final Rule for Regulations for the Regulatory Program of the

53. *Id.*

54. *Id.* at 130.

55. *Riverside Bayview Homes*, 474 U.S. at 130–31.

56. 467 U.S. 837, 842–43 (1984).

57. *Riverside Bayview Homes*, 474 U.S. at 131.

58. *Id.* at 133.

59. 531 U.S. 159 (2001); see *supra* notes 45–46 and accompanying text.

60. *Riverside Bayview Homes*, 474 U.S. at 131, n.8.

Corps of Engineers issued, in part, to clarify § 328.3(a)(3) of the Corps' regulation defining "waters of the United States" as including the following: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters" ⁶¹ The clarification of the regulation was that "waters of the United States" includes waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties;" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines" ⁶² The rule premised the Corps' jurisdiction on the waters being susceptible for use by migratory birds and that the birds were protected by treaty. In a five-to-four decision the Court held that the Corps' Migratory Bird regulation exceeded the authority granted the Corps under § 404 of the Act, a ruling dictated in part by the Court's desire to avoid deciding whether the rule exceeded the limits of Commerce Clause authority and whether the rule invoked federalism concerns by invading traditional state interests in the development and use of land and water resources. ⁶³

The narrow holding of *SWANCC* has little direct bearing on *Rapanos*. In *SWANCC*, however, the Court revived the significance of the term "navigable waters" for Clean Water Act jurisdiction, emphasizing that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Clean Water Act] in *Riverside Bayview Homes*" ⁶⁴ and that the Corps itself had originally limited its jurisdiction under the Act to traditionally navigable waters. ⁶⁵ Accordingly, the Court concluded that:

61. 33 C.F.R. § 328.3(a)(3) (2008).

62. Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. pt. 328).

63. Addressing commerce clause and federalism concerns raised by the Migratory Bird regulation, the Court stated:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

SWANCC, 531 U.S. at 172-73 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)) (internal citations omitted).

64. *SWANCC*, 531 U.S. 159, 167 (2001).

65. *Id.* at 168.

We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect," and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.⁶⁶

At least in part on constitutional grounds, the *SWANCC* Court also declined to grant *Chevron* deference to the Corps' Migratory Bird Rule regulation, finding that there were:

[S]ignificant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.⁶⁷

Nevertheless, after *SWANCC*, the Corps interpreted the decision narrowly, declined to amend its regulations, and continued to assert jurisdiction over non-navigable tributaries, jurisdiction lower federal courts in general upheld.⁶⁸ The stage was thus set for the *Rapanos* case.

66. *Id.* at 172.

67. *Id.* at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.") and 33 U.S.C. § 1251(b)) (internal citations omitted).

68. In *Rapanos*, Justice Scalia cited the following post *SWANCC* cases as examples of "sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries'":

[C]ourts have held that jurisdictional "tributaries" include the "intermittent flow of surface water through approximately 2.4 miles of natural streams and man-made ditches (paralleling and crossing under I-64)," [*Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (4th Cir. 2003)]; a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," [*United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003)]; irrigation ditches and drains that intermittently

C. *Rapanos v. United States*

1. *The Plurality Opinion*

Justice Scalia began his opinion for the *Rapanos* plurality with expression of thinly veiled outrage at the Corps' § 404 permitting process, stating:

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over “the waters of the United States” to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower [forty-eight] States. And that was just the beginning In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”⁶⁹

In addition, Justice Scalia painted the defendant, John Rapanos, as a sympathetic victim of the exercise of “the discretion of an enlightened despot,” that is, the Corps of Engineers, noting that “[i]n this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced [sixty-three] months in prison and hundreds of thousands of dollars in criminal and civil fines.”⁷⁰ In his concurring opinion, Justice Kennedy presented a more complete picture of Mr. Rapanos's conduct that placed his liberty and financial fortunes in jeopardy:

In December 1988, Mr. Rapanos, hoping to construct a shopping center, asked the Michigan Department of Natural Resources to inspect the Salzburg site. A state official informed Rapanos that while the site likely included regulated wetlands, Rapanos could proceed with the project if the wetlands were delineated (that is, identified and preserved) or if a

connect to covered waters, [Community Assn. for Restoration of Environment v. Henry Bosma Dairy, 305 F.3d 943, 954–955 (9th Cir. 2002)]; [Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 534 (9th Cir. 2001)]; and (most implausibly of all) the “washes and arroyos” of an “arid development site,” located in the middle of the desert, through which “water courses . . . during periods of heavy rain,” [Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1118 (9th Cir. 2005)].

Rapanos v. United States, 547 U.S. 715, 726–27 (2006).

69. *Id.* at 722.

70. *Id.* at 721.

permit were obtained. Pursuing the delineation option, Rapanos hired a wetlands consultant to survey the property. The results evidently displeased Rapanos: Informed that the site included between [forty-eight] and [fifty-eight] acres of wetlands, Rapanos allegedly threatened to “destroy” the consultant unless he eradicated all traces of his report. Rapanos then ordered \$350,000 worth of earthmoving and land clearing work that filled in [twenty-two] of the [sixty-four] wetlands acres on the Salzburg site. He did so without a permit and despite receiving cease-and-desist orders from state officials and the EPA. At the Hines Road and Pine River sites, construction work—again conducted in violation of state and federal compliance orders—altered an additional [seventeen] and [fifteen] wetlands acres, respectively.⁷¹

Rapanos involved four different wetland sites, three owned or controlled by Rapanos and one by the Carabells.⁷² At all four sites the Corps attempted regulation under § 404(a) by seeking to require that the defendants apply for permits to fill the wetlands. All four sites were adjacent to non-navigable tributaries of traditional navigable waters. In the *Carabell* case the wetland was also separated from the tributary, a human-made drainage ditch, by a four foot wide human-made impermeable berm, though apparently water from the wetland occasionally overflowed the berm into the ditch.⁷³

For the plurality, Justice Scalia began his substantive consideration of the case by rejecting the argument that the “waters of the United States” definition of “navigable waters” should be limited to the traditional “navigable in fact” standard. He turned to the language of the Act itself to establish that the definition of “navigable waters” as “waters of the United States” indicated that the Act’s jurisdictional scope included something more than traditional navigable waters, also noting that, “[w]e need not decide the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act. Whatever the scope of these qualifiers, the Clean Water Act authorizes federal jurisdiction only over ‘waters.’”⁷⁴ For the definition of the key term “waters,” Justice Scalia turned to

71. *Id.* at 763.

72. *Rapanos* combined two cases for review: *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004) and *Carabell v. United States*, 391 F.3d 704 (6th Cir. 2004). A website with links to numerous documents and other materials, including photographs, related to the *Carabell* and *Rapanos* cases has been created for academic purposes by Professor Kim Diana Connolly of the University of South Carolina School of Law. The website was created for use by Professor Connolly’s students and others interested in studying the cases. See <http://law.sc.edu/wetlands/rapanos-carabell/>.

73. *Rapanos*, 547 U.S. at 730.

74. *Id.* at 731. Justice Scalia explained further as follows:

The *Rapanos* petitioners contend that the terms “navigable waters” and “waters of the United States” in the Act must be limited to the traditional definition of

the 1954 edition of *Webster's New International Dictionary*.⁷⁵ From that dictionary definition he extracted the standard adopted by the plurality, finding that:

[O]n its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of "the waters of the United States" is thus not "based on a permissible construction of the statute."⁷⁶

In addition, Justice Scalia would require that the wetlands be "adjacent," within his conception of adjacency, to waters that meet the test of "waters of the United States":

The Daniel Ball, which required that the "waters" be navigable in fact, or susceptible of being rendered so. *See* 10 Wall., at 563, 19 L.Ed. 999. But this definition cannot be applied wholesale to the CWA. The Act uses the phrase "navigable waters" as a defined term, and the definition is simply "the waters of the United States." 33 U.S.C. § 1362(7). Moreover, the Act provides, in certain circumstances, for the substitution of state for federal jurisdiction over "navigable waters . . . other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto." § 1344(g)(1) (emphasis added). This provision shows that the Act's term "navigable waters" includes something more than traditional navigable waters. We have twice stated that the meaning of "navigable waters" in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S. at 167, 121 S. Ct. 675; *Riverside Bayview*, 474 U.S. at 133, 106 S.Ct. 455.

Id. at 730-31.

75. Picking up on the dictionary definition of "waters," Justice Scalia stated:

"[T]he waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second). On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely "streams," connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as "rivers," "lakes," and "oceans." None of these terms encompasses transitory puddles or ephemeral flows of water.

Id. at 732-33.

76. *Id.* at 739 (citing WEBSTER'S SECOND 2882).

Therefore, *only* those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters “ and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC*. . . . Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.⁷⁷

Since the Corps of Engineers regulation defines “waters of the United States” more broadly than Justice Scalia’s view of the statute would allow, he would find the regulation invalid.⁷⁸ In addition, the plurality determined that only its definition of “waters of the United States” was consistent with principles of federalism and the Act’s policy of respecting states’ rights.⁷⁹ To the plurality, the Corps’ regulation would run the risk of impermissibly involving the federal government in local land use planning.⁸⁰

2. Justice Kennedy’s Concurrence—“Significant Nexus”

In an ironic result of the fractured decision in *Rapanos*, of the three major opinions in *Rapanos*, Justice Kennedy’s concurrence, joined by no other Justice, is of greatest significance,⁸¹ at least until an additional decision of

77. *Id.* at 742 (emphasis in original).

78. *Id.*, at 732.

79. *Rapanos*, 547 U.S. at 737.

80. *Id.* at 737–38. Making his point that the Corps’ regulation encroached on local land use planning authority, Justice Scalia stated:

As we noted in *SWANCC*, the Government’s expansive interpretation would “result in a significant impingement of the States’ traditional and primary power over land and water use.” . . . Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board.

Id.

81. See *infra* Part V for an analysis of the relative significance of the three major opinions and an explanation of why Justice Kennedy’s opinion holds the greatest precedential value.

the Supreme Court, Congressional legislation,⁸² or agency regulation brings clarification.⁸³ In contradistinction to the Court's token and unexplained use of the term "significant nexus" in *SWANCC*,⁸⁴ for Justice Kennedy those words become the key to § 404(a) jurisdiction over wetlands.⁸⁵ In his concurrence Justice Kennedy imbues the significant nexus term with an elaborate substantive structure, concluding as follows:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."⁸⁶

82. See *infra* text accompanying notes 160, 162–63 for discussion of legislation pending in the House and Senate that would, in effect, adopt the language of the Corps' expansive regulatory construction of "waters of the United States" as the statutory definition of the term (Clean Water Restoration Act of 2007, H.R. 2421, S. 1870, 110th Cong. (2007)).

83. Clarification through revised regulations is unlikely under the Bush administration. The initial post *Rapanos* efforts of the EPA and Corps of Engineers have focused on giving EPA regions and Corps districts guidance for implementing *Rapanos*. More than a year after the *Rapanos* decision, those efforts culminated in the June 5, 2007 formal Guidance issued jointly by the agencies. Contemporaneous with the issuance of the Guidance, the agencies responded to a series of "Key Questions for Guidance Release." One of those questions asked whether the EPA and the Corps will proceed to develop regulations to clarify the scope of Clean Water Act jurisdiction. In pertinent part, the response stated:

Rulemaking is among several actions the Administration is considering in response to the *Rapanos* decision. Rulemaking takes time—certainly well over a year to develop a final rule, in part, because of the important public notice and comment provisions called for under the Administrative Procedure Act. Agency guidance can more quickly assist regulators, the regulated community, and the public to understand and consistently apply the CWA. As a result, EPA and the Corps have focused efforts to date on developing the Guidance issued today. . . . Any decision to pursue new rulemaking will be collaborative, as will the substantive work of developing any new rules to establish a revised regulatory definition of "waters of the [United States]."

ENVIRONMENTAL PROTECTION AGENCY & UNITED STATES ARMY CORPS OF ENGINEERS, CORPS AND EPA RESPONSES TO THE *RAPANOS* DECISION KEY QUESTIONS FOR GUIDANCE RELEASE 6 (2007), <http://www.epa.gov/owow/wetlands/pdf/13RapanosQ&As.pdf>.

84. The only reference to "significance nexus" in *SWANCC* was the cryptic comment that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. 159, 167 (2001).

85. "Absent a significant nexus, jurisdiction under the Act is lacking. Because neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary." *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring).

86. *Id.* at 780.

As an interpretive gloss on the significant nexus test, the required connection is to be assessed under the framework of the statute's objectives of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."⁸⁷

3. *The Dissenting Opinions of Justice Stevens and Justice Breyer*

Justice Stevens and the three justices who joined his dissenting opinion would uphold the status quo. That is, the four dissenters would validate the Corps' regulation broadly defining "waters of the United States" and would give the regulation *Chevron* deference.⁸⁸ As indicated in his separate dissent, Justice Breyer would simply hold that the authority of the Corps under the Clean Water Act "extends to the limits of congressional power to regulate interstate commerce."⁸⁹

Under both the plurality decision and Justice Kennedy's concurrence, the *Rapanos* and *Carabell* decisions were to be remanded to the lower court for application of the quite divergent standards announced in those opinions, agreement between the plurality and Justice Kennedy being limited primarily to the decision to remand. On February 12, 2007, the cases were remanded to the Sixth Circuit, which in turn remanded the cases to the district court with instructions to remand the cases to the Corps.⁹⁰

V. ASSESSING THE IMPACT OF *RAPANOS*

Of course, the first issue confronting courts attempting to apply the law of the *Rapanos* case is to determine just what that law is. That is, what is the legal standard to be divined from a fractured 4-1-4 decision that lacks an opinion to which a majority of the justices of the Supreme Court subscribe? In the Courts of Appeals' decisions since *Rapanos*, two primary approaches have emerged.

87. *Id.* at 759 (quoting 33 U.S.C. § 1251(a)).

88. *Id.* at 788. In contrast to Justice Scalia's view that the *Chevron* deference was not allowable because, "[t]he Corps' expansive interpretation of 'the waters of the United States'" is thus not "based on a permissible construction of the statute." *Id.* at 739. Justice Stevens's dissent viewed deference as a given: "The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision." *Id.* at 788 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984)). See also, *Id.* at 811 (Breyer, J. dissenting).

89. *Id.*

90. *Carabell v. United States Army Corps of Engineers*, 217 F.App'x. 431 (6th Cir. 2007).

Several courts have attempted to follow the traditional protocol prescribed by the Supreme Court in *Marks v. United States*⁹¹ for reading fractured Supreme Court decisions that produce no single rationale for the Court's judgment. The standard from *Marks* advises that: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'"⁹²

Representative of courts attempting a literal application of that standard, the Ninth Circuit in *Northern California River Watch v. City of Healdsburg*,⁹³ viewed Justice Kennedy's concurrence as the guiding opinion, stating, "Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law."⁹⁴

Other courts have followed the suggestion of Justice Stevens in his dissent in *Rapanos*:

In these cases [*Rapanos* and *Carabell*], however, while both the plurality and Justice KENNEDY agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases-and in all other cases in which either the plurality's or Justice KENNEDY's test is satisfied-on remand each of the judgments should be reinstated if *either* of those tests is met.⁹⁵

In a footnote to that statement, Justice Stevens explained that:

I assume that Justice KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice KENNEDY's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.⁹⁶

For courts following Justice Stevens's suggestion, Clean Water Act jurisdiction will be found if either the plurality's or Justice Kennedy's standards from *Rapanos* can be satisfied. This approach mirrors the practical align-

91. 430 U.S. 188 (1977).

92. *Id.* at 193 (quoting the opinion of Stewart, Powell, and Stevens, JJ. in *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

93. 457 F.3d 1023 (9th Cir. 2006), *withdrawn*, 496 F.3d 993 (9th Cir. 2007).

94. *Id.* at 1029.

95. *Rapanos v. United States*, 547 U.S. 715, 810 (2006) (Stevens, J., dissenting).

96. *Id.* at n.14.

ment of opinions within the Court and, the *Marks* case notwithstanding, hones in on those aspects of the decision on which a majority of the Court are in agreement.⁹⁷

In *United States v. Gerke Excavating, Inc.*,⁹⁸ the Seventh Circuit expounded on the approach suggested by Justice Stevens. In *Gerke Excavating*, the court undertook a careful analysis of the proper approach to resolving the standard to be applied from the fractured *Rapanos* decision:

When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

...

The test he proposed is that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of

97. Since deciding *Marks*, the Supreme Court has twice noted that the *Marks* test "is more easily stated than applied to the various opinions supporting the result . . ." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Nichols v. United States*, 511 U.S. 738, 745-46 (1994). In *Grutter* and *Nichols* the Court also noted that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'" *Grutter*, 539 U.S. at 325; *Nichols*, 511 U.S. at 745-46.

The opinion of the trial court in the *Grutter* case offered a cogent explanation of why the *Marks* analysis is not appropriate for plurality decisions like *Rapanos* in which the opinions constituting the plurality are fundamentally different:

In *Marks* the Court stated that the "governing standards" of [*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966) ("*Memoirs*")] were those announced by the three-Justice plurality because the other Justices who concurred in the judgment did so "on broader grounds."

The Court in *Marks* did not clearly explain what it meant by "narrow" and "broad" grounds. But in that particular case, the plurality's opinion was the "narrowest" in the sense that it was the most conservative reason for reversing the finding of obscenity and it was a reason that was subsumed within the grounds articulated by the other justices who concurred in the judgment.

The *Marks* framework cannot be applied to a case like [*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) ("*Bakke*)], where the various Justices' reasons for concurring in the judgment are not merely different by degree, as they were in *Memoirs*, but are so fundamentally different as to not be comparable in terms of "narrowness."

Grutter v. Bollinger, 137 F. Supp. 2d 821, 847 (E.D. Mich. 2001), *rev'd on other grounds*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

98. 464 F.3d 723 (7th Cir. 2006).

other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" This test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases, though not in all because Justice Kennedy also said that "by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach."

Thus, any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection. The plurality's insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the *Rapanos* dissenters when the balancing approach of Justice Kennedy favors the landowner. But that will be a rare case, so as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).⁹⁹

Of the first six Circuit Courts of Appeals decisions applying *Rapanos*, five found Justice Kennedy's concurrence to be the governing decision,¹⁰⁰ while the First Circuit determined that Clean Water Act jurisdiction may be found under either the plurality's test or that of Justice Kennedy.¹⁰¹ However, all circuits would agree that the prospect of a majority of the justices finding wetlands to be jurisdictional under circumstances in which Justice Kennedy would not, in the language of the Seventh Circuit in *Gerke Excavating*, "be a rare case."¹⁰² As a practical matter, Justice Kennedy's view will almost always be controlling, and it is his concurring opinion on which this article's attempt at analysis will primarily focus. That analysis will be directed at demonstrating that although in the abstract the significant nexus

99. *Id.* at 724-25 (internal citations omitted).

100. *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007); *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006).

101. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

102. *Gerke Excavating*, 464 F.3d at 725. In *Gerke Excavating*, the Seventh Circuit also agreed that, save in "rare case[s]," as practical matter Justice Kennedy's opinion will be controlling. *Id.*

test plausibly rationalizes the divergent “navigable waters” and “waters of the United States” language of § 404(a), the test fails for impracticability of application.

VI. ANALYSIS OF JUSTICE KENNEDY’S CONTROLLING OPINION

Since in all but rare cases Justice Kennedy’s concurring opinion will provide the standard for § 404(a) jurisdiction and will effectively set the standard to be applied from *Rapanos*, his opinion will be further examined to determine the impact of the decision. The examination begins with recognition that the text and definitional section of the Clean Water Act presented the *Rapanos* Court with a virtually irresolvable conundrum.¹⁰³ As noted, § 404(a) limits wetland protection to “navigable waters,” a term which standing alone and with reference to pre-Clean Water Act interpretations had a clear and definite meaning, that is, waters that are “navigable in fact” in that they “are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”¹⁰⁴ Since almost by definition, wetlands are generally not susceptible for use as thoroughfares for trade or travel, in isolation the definition of navigable waters would exclude nearly all wetlands. But, as noted, under the Clean Water Act the traditional definition of “navigable waters” is not necessarily the end point of the Act’s jurisdictional reach because the Act specifically defines “navigable waters” as “waters of the United States.”¹⁰⁵ However, the Act itself offers no further indication of the meaning of those terms or how their juxtaposition is to be harmonized. Three general definitional options are possible: (1) construe “waters of the United States” as simply adopting by reference the traditional definition given “navigable waters;”¹⁰⁶ (2) disregard “navigable waters” as a possible limitation on “waters of the United States” and focus on the meaning of the latter term;¹⁰⁷ or (3) attempt to reconcile the terms in a way that gives some effect to both.¹⁰⁸ In *Rapanos*, Justice Kennedy attempts reconciliation on a basis that is Constitutionally and interpretively plausible

103. As noted by Justice Kennedy in his concurring opinion in *Rapanos*, “Congress’ choice of words creates difficulties, for the Act contemplates regulation of certain ‘navigable waters’ that are not in fact navigable.” *Rapanos v. United States*, 547 U.S. 715, 779 (2006).

104. *The Daniel Ball*, 77 U.S. 557, 557 (1870). See *supra* notes 28–30 and accompanying text.

105. See *supra* Part III.

106. None of the opinions in *Rapanos* take this approach.

107. This is the approach of Justice Stevens in both *Rapanos* and *SWANCC*.

108. This is the approach of the *Rapanos* plurality opinion and Justice Kennedy’s concurring opinion in *Rapanos*.

but that carries results that present significant constraints on the efficacy of the wetlands protection program contemplated by § 404(a).

In attempting to square the Act's use of both "waters of the United States" and the qualifying "navigable waters," Justice Kennedy first notes that "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters' that are not in fact navigable."¹⁰⁹ But, he concludes that "the word 'navigable' in the Act must be given some effect."¹¹⁰ His route to giving some significance to "navigable" is to construct an elaborate and complex jurisdictional standard simplistically summed up as the "significant nexus" test, a phrase borrowed from *SWANCC*, where it was used without elaboration to explain the result in *Riverside Bayview Homes*.¹¹¹

As noted, under the "significant nexus" test, the Corps' jurisdiction over wetlands "depends upon the existence of a significant nexus between the wetland in question and navigable waters in the traditional sense."¹¹² That is, the "navigable waters" language serves to restrict the potential reach of "waters of the United States" to those waters that have the requisite connection with waters that are traditionally considered to be navigable.¹¹³ To Justice Kennedy, the significant nexus requirement explained both *Riverside Bayview Homes* and *SWANCC*:

Thus, in *SWANCC* the Court rejected the Corps' assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters. And in *Riverside Bayview*, while the Court indicated that "the term 'navigable' as used in the Act is of limited import," it relied, in upholding jurisdiction, on the Corps' judgment that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water[.]" . . . The implication, of course, was that wetlands' status as "integral parts of the aquatic environment"—that is, their significant nexus with navigable waters—was what established the Corps' jurisdiction over them as waters of the United States.¹¹⁴

To flesh out the "significant nexus" test, Justice Kennedy notes that the connection between the wetlands and the traditional navigable waters "must be assessed in terms of the statute's goals and purposes."¹¹⁵ That is, that:

109. *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

110. *Id.*

111. *See supra* note 64 and accompanying text.

112. *Rapanos*, 547 U.S. at 779.

113. *Id.*

114. *Id.* at 779 (citation omitted).

115. *Id.*

Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and it pursued that objective by restricting dumping and filling in “navigable waters.” With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage.¹¹⁶

Justice Kennedy would presume a “significant nexus” between wetlands adjacent¹¹⁷ to navigable-in-fact waters, finding that “the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.”¹¹⁸ However, lacking adjacency to navigable-in-fact waters, the requisite significant nexus between the wetlands and traditional navigable waters must be established on a case-by-case basis.¹¹⁹

Of the five types of Arkansas wetlands, “riverine”¹²⁰ and “fringe wetlands,”¹²¹ with their close proximity to streams and lakes, are likely to meet Justice Scalia’s conception of “adjacency” to waters that are “waters of the United States” and thus be considered jurisdictional under the plurality’s test. In addition, for similar reasons, riverine and fringe wetlands may fall within Justice Kennedy’s “conclusive standard for jurisdiction” that rests upon a reasonable inference of ecologic interconnection by showing adjacency alone and thus not require a significant nexus determination. Because

116. *Id.* (citations omitted).

117. Under the Corps’ regulations defining “waters of the United States,” “[t]he term ‘adjacent’ means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” 33 C.F.R. § 328.3(c).

118. *Rapanos*, 547 U.S. at 780.

119. Justice Kennedy foresaw the possibility of other circumstances in which Corps jurisdiction might be conclusive:

[I]t may well be the case that *Riverside Bayview*’s reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries. Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

Rapanos, 547 U.S. at 780–81. Justice Kennedy noted further that “[w]here an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.” *Id.* at 782.

120. See *supra* note 20 and accompanying text.

121. See *supra* note 21 and accompanying text.

“depressional wetlands,”¹²² “flats wetlands,”¹²³ and “slope wetlands”¹²⁴ are more likely to be geographically separated from waters that would qualify as “waters of the United States” under the plurality’s test and for that reason less likely to be considered “adjacent” for Justice Kennedy’s “conclusive standard for jurisdiction,” those wetlands will more likely have to satisfy the “significant nexus” test to be jurisdictional.

VII. OPERATION OF THE SIGNIFICANT NEXUS TEST IN PRACTICE

Although Justice Kennedy’s significant nexus standard provides an ostensibly cogent approach for solving the “navigable waters” versus “waters of the United States” conundrum¹²⁵ and even though, as recognized by Justice Stevens in his dissent, that “test will probably not do much to diminish the number of wetlands covered by the Act in the long run,”¹²⁶ the “significant nexus” test will seriously handicap the efficient and effective operation of the § 404(a) wetlands protection program. As a practical matter, making the significant nexus determination will have a decidedly negative impact on the time and expense required for the § 404(a) permit process. The steps that process contemplates generally require that the permit applicant first retain the services of an expert wetlands delineation consultant to visit and investigate the site and delineate the site’s wetland boundaries in accordance with the Corps’ Delineation Manual. Corps personnel then review the consultant’s work product and issue a jurisdictional determination.¹²⁷

Prior to *Rapanos*, the § 404(a) jurisdictional determination was generally limited to finding the presence of sufficient hydrophytic vegetation, hydric soil, and hydrology, that is, simply determining whether wetlands were present.¹²⁸ Now, to meet the requirements of Justice Kennedy’s controlling “significant nexus” test, once a conclusion is reached that the application does cover wetlands, additional determinations must be made whether the wetlands, either alone or in combination with other wetlands in the same region, significantly affect the chemical, physical, and biological integrity of traditional navigable waters.¹²⁹ Making that additional determina-

122. See *supra* note 22 and accompanying text.

123. See *supra* note 23 and accompanying text.

124. See *supra* note 24 and accompanying text.

125. See *supra* Part III.

126. *Rapanos v. United States*, 547 U.S. 715, 808 (2006) (Stevens, J., dissenting).

127. CONNOLLY ET AL., *supra* note 1, at 91.

128. Since the Corps of Engineers’ regulations were intended to extend § 404(a) jurisdiction to the limits of the Commerce Clause, jurisdictional determinations were seldom an issue.

129. See *supra* notes 86–87 and accompanying text.

tion is a time-consuming and expensive enterprise for the applicant and the reviewing Corps' personnel. As noted by Justice Stevens:

Justice KENNEDY's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview's* deferential approach avoided.¹³⁰

The terminology employed by the Supreme Court in setting the standards of both *SWANCC* and *Rapanos* contributes substantially to the difficulties of implementing the decisions. As noted by three members of the Jurisdiction Team of the EPA's Office of Wetlands, Oceans, and Watersheds, both *SWANCC* and *Rapanos*:

create new scientific and technical challenges by significantly reinterpreting the scope of waters protected under the Clean Water Act (CWA). Both decisions identified characteristics that a water must have to be considered a "water of the United States" protected by the CWA, using terms different from those typically used by aquatic resource scientists.¹³¹

In addition to the lack of congruence between the Supreme Court's terminology and that used by the scientists who must attempt to apply the Court's standards, to some extent those standards are not consistent with the approach scientists take to making the determinations required. For instance, the Jurisdiction Team members also note that, "the physical, chemical, and biological relationship between a water and a downstream traditional water is best understood when studied over several years, yet a conclusion regarding whether the relationship is sufficient to meet Kennedy's 'significant nexus' standard will be needed much more quickly."¹³²

The abandonment of the established methods of science for the contrived processes imposed by the Supreme Court decisions is also reflected in the *Rapanos* plurality's criterion that focuses on the importance of the permanency of the water's flow. The Jurisdiction Team members observe that "[d]etermining if a water is 'relatively permanent' ideally requires consid-

130. *Rapanos*, 547 U.S. at 809.

131. Donna Downing, Tracie-Lynn Nadeau & Rose Kwok, *Technical and Scientific Challenges in Implementing Rapanos' "Water of the United States,"* 22 A.B.A. Sec. Env., Energy, and Resources, Nat. Resources & Env't 42.

132. *Id.* at 44.

eration of more than one year's set of observations, yet neither field staff nor the regulated community can wait that long to complete a jurisdictional determination."¹³³ The result is to leave the applicant's expert consultants and Corps personnel without direction grounded in the science traditionally applied for drawing the wetlands jurisdictional conclusion.¹³⁴

With the fractured decision in *Rapanos* and the difficulties inherent in attempted application of Justice Kennedy's significant nexus test, clarification from the EPA and the Corps in the form of revised regulations or other direction was urgently needed. In limited response to that need, on June 5, 2007, nearly a year after the *Rapanos* decision, the agencies jointly issued the *Rapanos* Guidance Memorandum (the "Guidance").¹³⁵ The Guidance is directed to EPA regional and Corps district personnel in an effort to ensure that jurisdictional wetlands determinations under the Act are consistent with the *Rapanos* decision.¹³⁶

The permitting process outlined in the Guidance has the ironic effect of vividly illustrating the problems that may arise from the practical application of the "significant nexus" test. Although neither law nor regulation, the Guidance is the Corps' and the EPA's attempt to translate *Rapanos* into working standards governing the permitting process activities of their employees.¹³⁷ The Guidance purports to adopt Justice Stevens's suggestion that Corps' jurisdiction over wetlands is satisfied if either the approach of the

133. *Id.*

134. "The legal standards from *Rapanos* do not easily translate into workable criteria for use by the scientists who must apply the standards." Telephone Interview with Joyce Perser, M.S.E. Biological Sciences, J.D., Chief of Regulatory Division, United States Army Corps of Engineers, Little Rock District, in Little Rock, Ark. (Feb. 29, 2008) (emphasis added).

135. ENVIRONMENTAL PROTECTION AGENCY & UNITED STATES ARMY CORPS OF ENGINEERS, CLEAN WATER ACT JURISDICTION FOLLOWING THE UNITED STATES SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES*, (2007), <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf> [hereinafter *Guidance*].

136. *Id.* at 3.

137. As explained in the Guidance:

The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

Id. at 4 n.16.

plurality or Justice Kennedy is satisfied.¹³⁸ The Guidance applies the significant nexus test to the following described waters: (1) non-navigable tributaries that are not relatively permanent; (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent (including “similarly situated” wetlands); and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (for example, wetlands separated from a permanent tributary by uplands, a berm, dike or similar feature).¹³⁹

The problems wrought by the significant nexus test are most clearly reflected in the complex process the Guidance prescribes for application of the test:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.

...

- Significant nexus includes consideration of *hydrologic* factors including the following:

- volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
- proximity to the traditional navigable water
- size of the watershed
- average annual rainfall
- average annual winter snow pack

- Significant nexus also includes consideration of *ecologic* factors including the following:

- potential of tributaries to carry pollutants and flood waters to traditional navigable waters
- provision of aquatic habitat that supports a traditional navigable water
- potential of wetlands to trap and filter pollutants or store flood waters

138. “When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices. Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.” *Id.*

139. *Id.* at 7. “Similarly situated” wetlands include all wetlands adjacent to the same tributary. *Id.* The inclusion in the Guidance of “similarly situated” wetlands within the possible jurisdictional bounds of the significant nexus determination stems from Justice Kennedy’s statement in his *Rapanos* concurrence that “wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with *similarly situated* lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Rapanos v. United States*, 547 U.S. 715, 780 (2006) (emphasis added).

- maintenance of water quality in traditional navigable waters¹⁴⁰

The Guidance further complicates matters by “generally” excluding “[s]wales or erosional features (for example, gullies, small washes characterized by low volume, infrequent, or short duration flow)” and “[d]itches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.”¹⁴¹

The factors to be considered in making the significant nexus determination are fraught with difficulties of implementation—determinations requiring significant and expensive examinations, testing and synthesis, all to be undertaken by the landowner’s expert consultants and agency personnel possessing the technical education and experience appropriate to the tasks. The validity of Justice Stevens’s assessment that the significant nexus test would create additional work for all concerned and require increased time and resources as part of the permit process is evident from the steps the Guidance outlines for making the significant nexus determination. The difficulty of Justice Kennedy’s approach is not that significant nexus fails to accommodate the divergent “navigable waters” and “waters of the United States” definitional aspects of the Act’s jurisdiction, but that the effort of the EPA and the Corps to give flesh to the determination of whether wetlands “significantly affect the chemical, physical and biological integrity” of downstream traditional navigable waters inevitably results in a complex process so taxing of the human resources, time, and finances of all involved as to raise the question of whether the “game is worth the candle” and whether the process mandated by the guidance is workable in practice. The costs in terms of time and expense of satisfying the significant nexus test may well overwhelm the benefit of making the significant nexus determination.¹⁴²

Anecdotal evidence abounds that the significant nexus test has markedly strained the wetlands jurisdictional determination process.¹⁴³ However,

140. *Guidance*, *supra* note 135, at 7 (emphasis added).

141. *Id.*

142. The *Rapanos* decision and Guidance have significantly increased the processing time for § 404(a) permits in the Little Rock District of the Corps of Engineers. Interview with Joyce Perser, *supra* note 134.

143. Simultaneous with the issuance of the *Rapanos* Guidance on June 5, 2007, the EPA and the Corps announced a six-month public comment period to solicit input on early experience with implementing the guidance. The comment period began on June 8, 2007, and was extended an additional forty-five days to January 21, 2008. As of February 27, 2008, 1,820 comments had been posted to the website on which the comments are collected (some of the comments were posted after the deadline). Most of the comments were critical of the *Rapanos* Guidance, both in regard to the substance of the Guidance and especially in regard to the jurisdictional determination process established by the Guidance. The following comment

the best and perhaps most certain evidence of that strain comes directly from the EPA and the Corps in the form of statements about the impact of the Guidance. The EPA's and Corps' comments about that impact follows:

Implementation of the *Rapanos* decision and guidance requires the agencies to be more thorough in documenting their jurisdictional determinations (JD). . . .

Workload throughout the 38 Corps districts will increase dramatically and there will be shifts in workloads depending upon geographic factors. Additional costs could range from \$15 to \$20 million to:

- Develop and conduct staff training;
- Process a 5,500+ backlog of jurisdictional determinations and a concomitant backlog of project proposals;
- Perform additional field and desk review work;

by a coal company environmental affairs manager reflects the general tenor of the comments critical of the Guidance's effect on the permitting process:

Predictability of regulation is especially important to the mining industry given the extraordinary amount of time, money, and planning inherent to the development and management of most mining operations. Mine operators must conduct a site delineation and assess CWA jurisdiction well in advance of any projects that could potentially require a permit. The ability to determine CWA jurisdiction, up front, in a clear and predictable way, is critical to the mining industry's ability to compete in today's worldwide mineral and energy markets. Consequently, the mining industry is interested in the establishment of a clear and predictable scope for federal Clean Water Act jurisdiction.

We are extremely concerned that the *Rapanos* Guidance sets forth cumbersome, inefficient and time consuming procedures that will invariably cause further confusion and costly delays in the CWA permitting program. Furthermore, with Corps limited resources and field staff stretched so thin, the Corps's regulatory program has reached a tipping point. Instead of the clarity it promised, the Guidance is causing confusion and added delays in an already burdened and strained permit decision making process, further exacerbating the existing permit backlogs and delays that permittees are already experiencing.

The economic impact of permitting delays should not be underestimated. . . . The current permitting backlog is critical. . . . Typically if these permits are not issued within a certain period of time, corporate investments will be diverted away from Appalachian coal production. Mine closures have a ripple effect in the communities in which they are located. While the economic impact of hundreds of people losing high paying jobs on a small mining community may be obvious, failure to obtain a Corps issued permit may trigger a series of shutdowns. For example, after the shutdown of just one mine recently in Appalachia, a large, local equipment dealer began layoffs at its facility due to cancellation of equipment orders.

This type of the spillover effect can devastate communities.

Comment attachment submitted by Raymond R. Ashcraft, Jr., Manager, Environmental Affairs & Permitting, Alliance Coal, LLC at PUBLIC SUBMISSIONS, REGULATIONS.GOV, DRAFT EPA/ARMY GUIDANCE REGARDING CWA JURISDICTION AFTER RAPANOS 14 (comment submitted January 28, 2008)
<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=EPA-HQ-OW-2007-0282>.

- Conduct significant nexus determinations; and,
- Implement coordination/elevation requirements.

The additional time required to investigate, process, and complete JDs will be substantially greater than in the pre-Rapanos regulatory climate. Although the greatest workload impact falls on the Corps field personnel, EPA also will experience increased staffing demands associated with jurisdictional determinations. In conducting its environmental oversight of the regulatory program, EPA Regional staff will have increased field and desk review activities, especially in resolving any controversial jurisdictional determination cases.¹⁴⁴

Another factor adding to the complexity of the wetlands jurisdictional decision is that under the Guidance the agencies are to be more thorough in documenting the decision. The documentation requirement involves completion of a revised Jurisdictional Decision form¹⁴⁵ as prescribed by a sixty page (including appendices) "Jurisdictional Determination Form Instructional Guidebook."¹⁴⁶ In addition, the "Guidance Coordination Memorandum" requires that wetland jurisdictional decisions involving non-navigable, intra-state, isolated waters, and "significant nexus" determinations be elevated to Corps Headquarters for review prior to the district office final decision on jurisdiction, regardless of whether jurisdiction is asserted or declined.¹⁴⁷ Of course, the documentation and elevated review requirements add to the time and expense of the wetlands jurisdictional decision.

Divorced from considerations of practical efficacy, Justice Kennedy's formulation of the significant nexus test and the components of the test work a plausible resolution of the "navigable waters" versus "waters of the United States" conundrum. In giving substance to the significant nexus test, however, Justice Kennedy, in Justice Scalia's assessment, "all on his own,"¹⁴⁸ divines a regulatory standard from the "navigable waters" and "waters of the

144. UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE HIGHLIGHTS FOR *RAPANOS* AND *CARABELL* DECISION 2-3 (2007), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/guidhigh_06-05-07.pdf.

145. APPROVED JD FORM, APPENDIX B, JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (2007), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/jd_guidebook_051207final.pdf.

146. JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (2007).

147. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES ARMY CORPS OF ENGINEERS, MEMORANDUM FOR DIRECTOR OF CIVIL WORKS AND US EPA REGIONAL ADMINISTRATORS (Coordination Memorandum) 1-4 (2007), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/rapanos_moa_06-05-07.pdf, as modified by UNITED STATES ARMY CORPS OF ENGINEERS, MEMORANDUM FOR COMMANDER, MAJOR SUBORDINATE COMMANDS AND DISTRICTS (2008), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/jd_coord_proc_28jan08.pdf.

148. *Rapanos v. United States*, 547 U.S. 715, 757 (2006). This is Justice Scalia's description in the *Rapanos* plurality opinion of the source of Justice Kennedy's significant nexus test. *Id.*

United States" language of the statute that: the Corps of Engineers may assert regulatory jurisdiction over wetlands as "navigable waters" under § 404(a) "if the wetlands, [either] alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of traditional navigable waters, unless the wetlands' effects "on water quality are speculative or insubstantial."¹⁴⁹ This interpretation of the statutory language is tantamount to a rule or regulation written to give more specific effect to the statute. Comparison of the "significant nexus" standard as articulated by Justice Kennedy with the components of the Administrative Procedure Act's definition of a rule illustrates the regulatory nature of the standard: "[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency"¹⁵⁰

The difficulty that arises from Justice Kennedy's attempt to "implement, interpret or prescribe more specific meaning" to "navigable waters"—"waters of the United States"—is that the impact of his test was not subject to the processes that would be required of a similar regulatory standard issued by a federal administrative agency. The failure of the significant nexus test as a workable standard vividly demonstrates the value of those processes.

That the significant nexus test would fail in practice could have been foreseen had it been subjected to processes similar to those applicable to issuance of regulatory standards by federal administrative agencies. For instance, had the notice, public comment, and evaluation requirements of the Administrative Procedure Act¹⁵¹ and the *Regulatory Planning and Review* process, outlined for adoption of federal regulations in Executive Order No. 23,866,¹⁵² been applied to the significant nexus standard, the practical deficiencies of the test would have become apparent. Although application of that process to the significant nexus test from Justice Kennedy's concurrence is somewhat fanciful, undertaking a hypothetical application of the process serves to demonstrate why, if the test had been subjected to the process, its efficacy in practice would have been suspect from its inception. The sections of the *Regulatory Planning and Review* process most pertinent to consideration of the efficacy of the significant nexus test include requirements that:

1. The agency make a qualitative and quantitative assessment of costs and benefits of the regulation.

149. *Id.* at 780 (Kennedy, J., concurring).

150. 5 U.S.C. § 551(4) (2000).

151. 5 U.S.C. § 553 (2000).

152. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

2. The agency consider the costs and benefits of alternative regulatory approaches.

3. The agency's decision be based on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

4. The agency seek views of appropriate state, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities.

5. The agency assess the effects of the regulation on state, local, and tribal governments, including specifically the availability of resources to carry out the regulation, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives.

6. The agency tailor the regulation to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things and to the extent practicable, the costs of cumulative regulations.¹⁵³

Consideration of those factors would have revealed that the costs associated with making the significant nexus determination outweigh the benefits of the test when compared with a clearer cut alternative test such as advocated by Justices Stevens or Breyer.¹⁵⁴ Notice to the public and to concerned state and local governmental entities would have produced comments and suggestions that could have been factored into the decision making process that may well have produced a regulation that would have been Constitutional, consistent with the statutory language, and workable in practice. A regulation that, to paraphrase Justice Stevens's comment, would have assisted developers wishing to fill wetlands to know whether they need to

153. *Id.*

154. Justice Stevens would find wetland adjacency to navigable water tributaries alone sufficient for Corps jurisdiction without specific evidence of "connectivity" or "significant nexus":

I think it clear that wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream. . . . [T]hese wetlands can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the 'limited' connection to traditionally navigable waters that is all the statute requires.

Rapanos, 547 U.S. at 808 (citations omitted). Justice Stevens stated further: "Unlike Justice KENNEDY, I see no reason to change *Riverside Bayview's* approach—and every reason to continue to defer to the Executive's sensible, bright-line rule." *Id.* at 809. And, Justice Breyer would hold that the Corps' wetland jurisdictional authority "extends to the limits of congressional power to regulate interstate commerce," that the Corps' regulations are within those limits, and that the regulations are entitled to *Chevron* deference. *Id.* at 809. See *supra* notes 54–57 and accompanying text for discussion of *Chevron* deference.

get § 404 permits and would not have required that landowners' consultants and Corps personnel undertake complex time and resource consuming case-by-case jurisdictional determinations.¹⁵⁵

Was the significant nexus test constitutionally required or mandated by the language of the definitional provisions of the Clean Water Act? Justice Scalia for the plurality complained that Justice Kennedy "simply rewrites the statute, using for that purpose the gimmick of 'significant nexus,'"¹⁵⁶ and that Justice Kennedy "has devised his new statute all on his own. It purports to be, not a grudging acceptance of an agency's close-to-the-edge expansion of its own powers, but rather *the* most reasonable interpretation of the law. It is far from that"¹⁵⁷

VIII. RESOLUTION OF THE WETLAND JURISDICTIONAL ISSUES CREATED BY THE CLEAN WATER ACT JURISDICTIONAL DEFINITIONS, THE *RAPANOS* DECISION, AND THE *RAPANOS* GUIDANCE

If not broken, the Corps' wetland jurisdictional determination process is certainly in need of repair. Relief could come from a clarifying decision of the United States Supreme Court, revised regulations of the EPA and Corps, or legislative restatement of the jurisdictional reach of regulatory authority under § 404(a). Another decision of the Supreme Court is not currently on the horizon, and considering the division among the justices of the Court in *Rapanos*, clarification from the Court would appear to be unlikely, at least until there is a change in the Court's composition.

In statements associated with the issuance of the Guidance, the EPA and the Corps have indicated a vaguely expressed intent to adopt revised regulations:

Rulemaking is among several actions the Administration is considering in response to the *Rapanos* decision. Rulemaking takes time—certainly well over a year to develop a final rule, in part, because of the important public notice and comment provisions called for under the Administrative Procedure Act. Agency guidance can more quickly assist regulators, the regulated community, and the public to understand and consistently apply the CWA. . . . Any decision to pursue new rulemaking will be col-

155. Justice Stevens's comment was:

Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications.

Rapanos, 547 U.S. at 809.

156. *Id.* at 756.

157. *Id.* at 756–57.

laborative, as will the substantive work of developing any new rules to establish a revised regulatory definition of “waters of the [United States].”¹⁵⁸

“The agencies intend to more broadly consider jurisdictional issues, including clarification and definition of key terminology, through rulemaking or other appropriate policy practice.”¹⁵⁹

A fair conclusion to be drawn from the indefinite statements that the agencies may at some point engage in clarifying rulemaking when coupled with the reality that a change of Presidential administrations is on the near horizon is that the issuance of revised regulations will not occur for several years, if at all. In addition, since the decisions in *Rapanos* purport to be driven by interpretation of the “waters of the United States” language of § 404(a) rather than the strictures of the Constitution, any rulemaking would be constrained by the statutory standard and the interpretation of that standard in *Rapanos*. In short, revised regulations could well provide little more direction than the *Rapanos* Guidance itself.

The prospect of clarification through a legislative solution appears somewhat more promising. Bills styled “The Clean Water Restoration Act of 2007” are pending in both houses of Congress.¹⁶⁰ Section 4, the heart of the proposed act, adopts verbatim the operative language of the central definition of “waters of the United States” from the existing Corps of Engineers Regulations:¹⁶¹

The term “waters of the United States” means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.¹⁶²

158. ENVIRONMENTAL PROTECTION AGENCY & UNITED STATES ARMY CORPS OF ENGINEERS, CORPS AND EPA RESPONSES TO THE *RAPANOS* DECISION: KEY QUESTIONS FOR GUIDANCE RELEASE 6 (2007), <http://www.epa.gov/owow/wetlands/pdf/13RapanosQ&As.pdf>.

159. UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE HIGHLIGHTS FOR *RAPANOS* AND *CARABELL* DECISION 3 (2007), http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/guidhigh_06-05-07.pdf.

160. Clean Water Restoration Act of 2007, H.R. 2421, S. 1870, 110th Cong. (2007).

161. 33 C.F.R. § 328.3(a)(3).

162. Clean Water Restoration Act of 2007, H.R. 2421, 110th Cong. § 4, (2007); Clean Water Restoration Act of 2007, S. 1870, 110th Cong. § 4, (2007).

Enactment of the proposed legislation would return wetland jurisdictional determinations to at least pre-*Rapanos* circumstances and bring needed clarity to the process. However, to date the only action in either house has been to refer the bills to committees.¹⁶³

The combined impact of the fractured *Rapanos* decision and the Guidance have left the wetlands jurisdictional determination process in disarray. Perhaps action will be taken at some level to bring clarity to the wetland jurisdictional determination process. Regardless, the aftermath of *Rapanos* and the Guidance certainly provides cause to consider the accuracy of an insightful observation reflected in an anonymous post to a *Rapanos* Guidance website discussion forum:

It would appear that each and every time a plaintiff brings a case against the authority of Section 404 administration, the courts conjure a well-intentioned, but scientifically uninformed opinion. Then, it winds-up that the greater regulated public is who's made to pay the price of the courts' ambiguity and ignorance¹⁶⁴

163. On May 23, 2007 H.R. 2421 was referred to the House Subcommittee on Water Resources and Environment, and on July 25, 2007, S. 1870 was referred to the Senate Committee on Environment and Public Works.

164. Anonymous response posted to Federal Highway Administration website discussion forum, RE: NEPA FEDERAL HIGHWAY ADMINISTRATION NATURAL ENVIRONMENT 11-12 (posted Feb. 5, 2008, <http://nepa.fhwa.dot.gov/ReNEPA/ReNepa.nsf/discussionDisplay?Open&id=D6299D396A00B0AF852573E5006D397C&Group=Natural%20Environment&tab=DISCUSSION>).

